

Fordham Law Review

Volume 50 | Issue 4

Article 2

1982

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Recommended Citation

Seymour Glanzer, Howard Schiffman, and Mark Packman, *Settlement of Securities Litigation Through the Issuance of Securities Without Registration: The Use of Section 3(a)(10) in SEC Enforcement Proceedings*, 50 Fordham L. Rev. 533 (1982).

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Settlement of Securities Litigation Through the Issuance of Securities Without Registration: The Use of Section 3(a)(10) in SEC Enforcement Proceedings

Cover Page Footnote

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SETTLEMENT OF SECURITIES LITIGATION THROUGH THE ISSUANCE OF SECURITIES WITHOUT REGISTRATION: THE USE OF SECTION 3(a)(10) IN SEC ENFORCEMENT PROCEEDINGS

SEYMOUR GLANZER,* HOWARD SCHIFFMAN** AND
MARK PACKMAN***

INTRODUCTION

SECTION 3(a)(10)¹ of the Securities Act of 1933 (Act or 1933 Act)² exempts from the registration requirements of the Act³ securities issued in exchange for legal claims, property, or other securities when a court or other competent tribunal has approved the transaction after holding an adversary hearing on its fairness. Historically, the section 3(a)(10) exemption has been utilized in three instances: (1) settlement of private litigation;⁴ (2) reorganization of insolvent business entities

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The authors were counsel to certain of the settling defendants in *SEC v. Blinder Robinson & Co.* and were responsible for the presentation of evidence at the § 3(a)(10) fairness hearing held in that case.

1. 15 U.S.C. § 77c(a)(10) (1976). Section 3(a)(10) exempts from the registration requirements of the Act "[a]ny security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, . . . where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court." *Id.*, see *Merger Mines Corp. v. Grismer*, 137 F.2d 335, 341 (9th Cir.), *cert. denied*, 320 U.S. 794 (1943) (trial court erred in holding securities not subject to registration when it failed to hold fairness hearing).

2. 15 U.S.C. §§ 77a-bbbb (1976).

3. Section 5(a) of the 1933 Act prohibits the sale of securities unless a registration statement is in effect. 15 U.S.C. § 77e(a) (1976). Section 5(c) prohibits the offer of securities unless a registration statement has been filed. 15 U.S.C. § 77e(c) (1976).

4. A large majority of SEC no action letters relating to the use of § 3(a)(10) in litigation settlements involve shareholders' actions under the civil liability provisions of the securities laws. See J. Hicks, *Exempted Transactions Under the Securities Act of 1933* § 3.02[2][a] n.5 (rev. ed. 1981).

outside of bankruptcy proceedings;⁵ and (3) reorganization of solvent business entities.⁶ Although section 3(a)(10) has been used with increasing frequency in recent years for settlements of private litigation,⁷ until recently no court or administrative agency had defined "fairness" for purposes of determining whether the exemption applies.⁸

In *SEC v. Blinder Robinson & Co.*,⁹ a federal district court made two significant contributions to the expanded use of section 3(a)(10). For the first time a court used section 3(a)(10) to exempt securities issued pursuant to the settlement of an action brought by the Securities and Exchange Commission (SEC).¹⁰ Equally important, the court articulated standards to be used in determining the fairness of the settlement.¹¹

Part I of this Article analyzes *Blinder Robinson* in light of its novel application of section 3(a)(10). Part II discusses standards to govern section 3(a)(10) hearings based upon the *Blinder Robinson* decision.¹² As part of this discussion, practical suggestions are made as to the type of evidence that should be offered to establish the fairness of the settlement.

5. Although the exemption is available in bankruptcy proceedings, see 1 L. Loss, Securities Regulation 64-67 (2d ed. 1961), in such instances, most issuers rely on the exemptions from registration contained in the federal bankruptcy laws. See 11 U.S.C. § 1145 (Supp. II 1978) (formerly 11 U.S.C. §§ 664(a)(2), 793(a)(2) (1976)); Ash, *Reorganizations and Other Exchanges Under Section 3(a)(10) of the Securities Act of 1933*, 75 Nw. U. L. Rev. 1, 8-10 (1980).

6. Corporations undergoing a reorganization of this nature have most readily availed themselves of § 3(a)(10). They may use the exemption when they reorganize through exchange offers, exchange agreements, statutory mergers or consolidations, or purchases of assets for stock. See Ash, *supra* note 5, at 42-45; Mann, *The Section 3(a)(10) Exemption: Recent Interpretations*, 22 U.C.L.A. L. Rev. 1247, 1248-49 (1975).

7. See Ash, *supra* note 5, at 30-31, 38-39.

8. See *id.* at 17.

9. 511 F. Supp. 799 (D. Colo. 1981).

10. Although most of the private litigation using § 3(a)(10) had been based on alleged securities violations, see *supra* note 4, this was the first time the section was applied in settling a government enforcement action under the securities laws.

11. SEC v. *Blinder Robinson & Co.*, 511 F. Supp. 799, 801 (D. Colo. 1981). The definition of "fairness" for purposes of the exemption is particularly noteworthy because its appearance in the 1933 Act seems contrary to the underlying philosophy of the Act. The 1933 Act is not concerned with policing the fairness of business investments. Its disclosure requirements are based on the notion that an informed individual—not the SEC or any federal court—should judge the fairness of a particular investment. See 1 L. Loss, *supra* note 5, at 121-27. Thus, the requirement in § 3(a)(10) that a judge must determine the "fairness" of an issuance appears contrary to the policy of the Act. See Ash, *supra* note 5, at 5. In *Blinder Robinson*, however, the court interpreted the word in a manner consistent with the policy of the Act by focusing on the fairness of the disclosures made pursuant to the proposed issuance rather than judging the fairness of the settlement from a monetary standpoint. 511 F. Supp. at 802.

12. When appropriate, this Article will compare the § 3(a)(10) fairness standards with the fairness criteria used to judge class action settlements. Note, however, that

I. SEC v. BLINDER ROBINSON & Co.—
AN ANALYSIS

In *Blinder Robinson*, the SEC brought a civil injunctive action against American Leisure Corporation (ALC), its principal officers, its underwriter and others,¹³ charging violation of the antifraud provisions of the securities laws.¹⁴ The allegations of the complaint centered on ALC's all-or-nothing best-efforts¹⁵ public offering of ten million units of its common stock and warrants. Specifically, the SEC charged that the defendants had failed to disclose material changes in the public offering plan that created the appearance that the offering had sold out during the offering period.¹⁶ In addition to an injunction, the SEC sought the ancillary remedy of rescission of the public offering.¹⁷

At the time of the complaint, the issuer, ALC, was in a developmental stage, with an elaborate plan to build a hotel-casino complex in Atlantic City, New Jersey. ALC had acquired land for the project, commissioned and received architectural designs, and begun the process of obtaining a casino license and other required permits from

although similarities exist, one important distinction is that here the judge determines the adequacy of the disclosure, while in a class action the judge must determine the fairness of the entire settlement. See 3 H. Newberg, *Newberg on Class Actions* § 5600a, at 494 n.20 (1977).

13. The SEC sued the issuer, American Leisure Corporation, the underwriter, two additional corporations and the chief executive officers of each. Complaint, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981). The authors served as counsel to the president of ALC, Nathan S. Jacobson, and the secretary and treasurer of ALC, Irwin S. Lampert.

14. Complaint at 1-2, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981). The alleged violations involved primarily § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and rules 10b-5, 17 C.F.R. § 240.10b-5 (1981), and 10b-9, 17 C.F.R. § 240.10b-9 (1981), promulgated thereunder.

15. In best-efforts underwriting, an underwriter does not oblige itself to sell all of the issuer's stock but rather undertakes to use its best efforts to do so. 1 L. Loss, *supra* note 5, at 171. "The securities house, instead of buying the issue from the company and reselling it as principal, sells it for the company as agent; and its compensation takes the form of an agent's commission rather than a merchant's or dealer's profit." *Id.* (emphasis omitted). In an all-or-nothing offering, the issuer agrees to refund the proceeds of the offering to purchasers if the offering does not sell out. G. Robinson, *Going Public: Successful Securities Underwriting* § 22, at 95 (K. Eppler 2d ed. 1971).

16. Complaint at 14-18, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981). The complaint sought injunctive and other equitable relief, including rescission and an accounting. This Article is concerned with the settlement between defendant ALC and its officers and the SEC. Certain other defendants entered into separate settlement agreements. In July, 1981, the federal district court in Denver tried the case against the underwriter and its president, the only remaining defendants. At this writing, no decision has been handed down by the court.

17. *Id.* at 18.

various state regulatory agencies.¹⁸ Because ALC was in a developmental stage, rescission would have forced it to liquidate, resulting in the shareholders suffering a substantial discount for their shares.¹⁹

To avoid the prospect of costly litigation and the possibility of liquidation, ALC and two of its officers agreed to a settlement with the SEC. The agreement provided that the issuer would exchange additional shares of its stock and promissory notes for the release of any potential legal claims of shareholders and former shareholders who chose to participate in the settlement.²⁰ Because the settlement proposed the issuance of securities, the question arose whether a registration statement had to be filed. The preparation of a registration statement in this situation was not only impractical because of the cost and time that would be incurred, but also presented difficult disclosure questions concerning the characterization of the litigation and the settlement.²¹ Accordingly, counsel for the settling defendants suggested the use of the section 3(a)(10) exemption from registration.

The court first made a preliminary finding that section 3(a)(10) was applicable.²² After setting a date for the fairness hearing, the court

18. Memorandum of Defendants ALC, Nathan Jacobson and Irwin Lampert in Support of Proposed Settlement at 3-7, *SEC v. Blinder Robinson & Co.*, 511 F. Supp. 799 (D. Colo. 1981) [hereinafter cited as Defendants' Memorandum].

19. As the court pointed out, there was not enough cash for complete restitution. 511 F. Supp. at 802. Further, the devaluation of assets that would result from a forced sale and the administrative expenses incurred would inevitably result in a discount. See Defendants' Memorandum, *supra* note 18, at 19.

20. Specifically, defendants ALC, Jacobson and Lampert agreed to entry of a final order requiring future compliance with certain provisions of the federal securities laws. The order also offered a 10% stock bonus to nearly all ALC shareholders of record on February 13, 1981, upon their tender to ALC of a Proof of Claim and Release. Shareholders who had purchased stock of ALC during the public offering period, December 26, 1979 to March 25, 1980, were offered the alternative of receiving a secured five year, eight percent interest bearing promissory note upon tender of their shares to ALC along with a Proof of Claim and Release. Finally, to those who had purchased shares in the public offering and who had sold them at a loss before February 13, 1981, ALC offered a promissory note in the amount of the loss upon receipt of a Proof of Claim and Release. *SEC v. Blinder Robinson & Co.*, No. 80-M-1125, final order at 4-7 (D. Colo. Apr. 14, 1981).

21. A registration statement for securities issued in settlement of an SEC injunctive action would have to describe the circumstances of the initial offering and the ensuing litigation. See Regulation S-K, item 5, 17 C.F.R. 229.20: (1981) (issuer must describe material legal proceedings). It is precisely these circumstances, however, that are in sharp dispute in an SEC suit. Consequently, it would be virtually impossible for the SEC and the settling defendants to agree on the wording of the registration statement. Moreover, where factual disputes exist, the facts that defendants are forced to disclose in a registration statement may be interpreted as admissions in the SEC suit or in any subsequent litigation. By contrast, in a fairness hearing the defendants are not forced to confront these difficult issues because both the court, by virtue of its familiarity with the case, and the shareholders, by virtue of the notice they receive pursuant to § 3(a)(10), are aware of the disputed circumstances of the initial offering.

22. See *SEC v. Blinder Robinson & Co.*, 511 F. Supp. 799, 800 (D. Colo. 1981).

interpreted the statute's provision for a "hearing . . . at which all persons to whom it is proposed to issue securities . . . shall have the right to appear"²³ to require written notification to all shareholders.²⁴ Consequently, notice was sent to approximately eleven thousand shareholders detailing the settlement and apprising them of their right to appear at the fairness hearing to voice their approval or objections to the proposed settlement plan.²⁵ Prior to the hearing, counsel for all parties submitted briefs on the fairness issue and several shareholders submitted written objections.²⁶

At the hearing, the settling defendants presented evidence similar to the type of information typically found in registration statements. In general, the evidence concerned the use of the funds obtained from ALC's public offering. Testifying in support of the settlement, the chief operating officer of ALC detailed ALC's plans for the construction and operation of a hotel-casino in Atlantic City. This evidence

23. 15 U.S.C. § 77c(a)(10) (1976).

24. SEC v. Blinder Robinson & Co., No. 80-M-1125 (D. Colo. Feb. 18, 1981) (order setting hearing date and directing notification of shareholders). Because the settlement potentially affects the property interests of so many, adequate notice and an opportunity to object are particularly important. The SEC, however, has not yet specified the method or scope of notice required by the exemption. Under Fed. R. Civ. P. 23(e), settlement of a class action may not occur without the court's approval after notice has been sent to interested parties "in such manner as the court directs." *Id.* Although the SEC has acknowledged that a notice procedure that complies with rule 23(e) satisfies the notice requirement of § 3(a)(10), the SEC has declined to incorporate the Federal Rules standard into the exemption. See J. Hicks, *supra* note 4, § 3.02[4][a], at 3-37 (citing Mackey Int'l Inc., No Action Letter from SEC, 1974 CCH Fed. Sec. Microfilm roll 3, frame 03484 (Feb. 25, 1974)).

25. The notice procedure instituted in *Blinder Robinson* would seem particularly suited to ensure complete protection of interested parties. The court ordered that defendants send written notice of the hearing by first class mail to all shareholders. The notice was to contain the material terms of the proposed settlement and a clear explanation of the shareholders' right to appear at the hearing and object to the settlement. In addition, the same notice of hearing and proposed settlement was to be published in a newspaper of general circulation where the largest number of shareholders would probably be found, in this case the Denver, Colorado area. Finally, defendants were to file an affidavit with the court explaining how and when the hearing notice had been completed. After the hearing, all shareholders were to be sent notice by first class mail that the settlement had been approved and were to be advised of their opportunity to "opt in," or participate. SEC v. Blinder Robinson & Co., No. 80-M-1125 (D. Colo. Feb. 18, 1981) (order preliminarily approving settlement).

26. The majority of objections sought total rescission or a higher rate of interest. See Defendants' Memorandum, *supra* note 18, exhibits 1-10. In its subsequent approval of the settlement, the court did not specifically explain why it found these objections unpersuasive. It did find important, however, that the shareholders were not forced to participate in the settlement and, therefore, could seek greater recovery by pursuing private claims for relief. 511 F. Supp. at 801.

included copies of contracts,²⁷ architectural drawings²⁸ and information concerning ALC's progress in obtaining the approval of regulatory authorities,²⁹ as well as prospects for establishing business operations.³⁰ In addition, expert testimony was presented concerning the financial condition of the company, the value of the proposed settlement to shareholders, the trading activity in the issuer's stock and the probable financial consequences of continued litigation and rescission.³¹ All persons appearing in the proceeding were given an opportunity to cross-examine the witnesses and to be heard.³² Finally, and most significantly, attorneys for the SEC offered an official letter from the secretary of the Commission stating that the Commission had reviewed and approved the settlement.³³

At the conclusion of the hearing, the judge announced his approval of the settlement³⁴ and established a schedule for its implementation.³⁵ The schedule provided that ALC would send to all shareholders a Proof of Claim and Release form,³⁶ which the shareholders had to complete within approximately sixty days to participate in the settlement.³⁷ Shareholders who did not return the Proof of Claim and Release were not bound by the settlement and had the option of bringing a private action against the settling defendants. Further, the court ordered ALC's counsel to review all claims and submit to the SEC and ALC a report listing all claims received, approved and rejected. ALC was obliged to pay the claims approved within thirty days after receipt of the report unless the SEC or ALC filed written objections within fifteen days. With respect to the claims objected to,

27. Reporter's Transcript of Proceedings at 54, 59, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981) (evidence introduced on April 10, 1981).

28. *Id.* at 42.

29. *Id.* at 61-65.

30. *Id.* at 43-52.

31. *Id.* at 86-109.

32. Some shareholders took the opportunity to voice their opinions on the fairness of the settlement. *Id.* at 136-41.

33. *Id.* at 117. It should be noted that the SEC approved the settlement in its role as a litigant. Accordingly, the Commission's deliberations regarding the settlement were not open to the public, and no opinion was issued. The Commission merely issued a one sentence statement that the settlement had been approved. To date, then, the Commission has given no indication of the criteria it may use in determining whether to approve future settlements under § 3(a)(10).

34. Reporter's Transcript of Proceedings: Findings at 11, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981) (statement of Judge Matsch on Apr. 14, 1981).

35. SEC v. Blinder Robinson & Co., No. 80-M-1125, final order at 6 (D. Colo. Apr. 14, 1981).

36. *Id.* exhibit A.

37. The court approved the settlement on April 10. *Id.* exhibit A. The terms of the settlement provided that shareholders who wished to participate were required to complete and return the Proof of Claim and Release form by June 12.

the court ordered the SEC and ALC to confer with ALC's counsel to resolve the dispute. The court retained jurisdiction to settle any disputes not resolved by this informal procedure.³⁸

Court approval did not entail evaluation of the monetary terms of the settlement. This was left to the parties in the litigation and those shareholders who agreed to participate. Approval, however, did require the court to confront the novel issue of what standard to apply to ascertain fairness in a section 3(a)(10) hearing.

II. STANDARDS FOR DETERMINING FAIRNESS UNDER SECTION 3(a)(10)

Section 3(a)(10) furthers the underlying purpose of the 1933 Act—protection of investors through full disclosure of material information³⁹—by requiring court approval of the fairness of the terms of a proposed settlement.⁴⁰ The *Blinder Robinson* court began its fairness analysis, however, with the observation that “[t]here is no statutory definition of ‘fairness’ as used in Section 3(a)(10) and there is no general guidance suggesting the criteria for the court to consider in determining the question of approval.”⁴¹ One commentator examining the issue had suggested that courts should follow the general rule that approval should be given if the “settlement . . . offered is . . . ‘fair’, ‘reasonable’, and ‘adequate’,”⁴² a rule derived principally from cases decided under rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.⁴³ These federal rules concern court approval for the settlement of class actions and derivative suits, respectively. In addition to the express requirements of the rules, courts have developed a series

38. *Id.* at 6-7.

39. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

40. *Merger Mines Corp. v. Grismer*, 137 F.2d 335, 341 (9th Cir.) (§ 3(a)(10) exemption not available without a fairness hearing), *cert. denied*, 320 U.S. 794 (1943).

41. *SEC v. Blinder Robinson & Co.*, 511 F. Supp. 799, 801 (D. Colo. 1981); *accord Ash, supra* note 5, at 17. The legislative history of § 3(a)(10) is singularly unhelpful. Nowhere does it shed light on the meaning of the term “fairness.” For a summary of the legislative history, see J. Hicks, *supra* note 4, § 3.01[2].

42. J. Hicks, *supra* note 4, § 3.02[4][b], at 3-41. *See generally*, Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 980 (1971); Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part II: The Settlement*, 23 Sw. L.J. 765, 792 (1969).

43. Fed. R. Civ. P. 23(e), 23.1. Rule 23(e) provides as follows: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Fed. R. Civ. P. 23(e). Rule 23.1, which applies to shareholders' derivative suits, provides in relevant part: “The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.” Fed. R. Civ. P. 23.1.

of standards for evaluating the fairness of such settlements.⁴⁴ A typical expression of these criteria can be found in the Second Circuit's opinion in *Newman v. Stein*:⁴⁵

[T]he role of a court in passing upon the propriety of the settlement . . . is a delicate one. . . . [S]ince " '[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation', the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial'." Rather . . . it must reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."⁴⁶

Against this background, the *Blinder Robinson* court drew a distinction between the proposed settlement in the case before it and other instances when courts have been asked to approve settlements.⁴⁷ Although the court generally followed the standards used for the approval of class action settlements, it was careful to distinguish them from the criteria to be used in a section 3(a)(10) settlement:

The SEC is not here as the representative of a class of investors claiming relief. Accordingly, this court is not confronted with measuring the adequacy of the relief obtained by comparing the value of the securities to be issued with the claims of loss, as would be true in the settlement of a class action or a derivative action by shareholders under Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure. . . .

Indeed, the settlement specifically provides that those persons who do not wish to accept the offer from the settling defendants are not foreclosed from pursuing private claims for relief. . . .

. . . .

This is a situation in which the value of the stock and notes to be issued must be considered speculative because the underlying business is in a developmental stage. I have made no attempt to determine value, now or in the future, because the fairness of the offer does not depend upon it.⁴⁸

44. See *Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir.), cert. denied, 409 U.S. 1039 (1972); *Stull v. Baker*, 410 F. Supp. 1326, 1332-37 (S.D.N.Y. 1976); *Patterson v. Newspaper & Mail Deliverers' Union*, 384 F. Supp. 585, 587-88 (S.D.N.Y. 1974), aff'd, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

45. 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039 (1972).

46. *Id.* at 691-92 (citations omitted) (quoting *Haudek*, supra note 42, at 795, and *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)).

47. *SEC v. Blinder Robinson & Co.*, 511 F. Supp. 799, 801 (D. Colo. 1981).

48. *Id.* at 801 (citations omitted).

The court also contrasted the section 3(a)(10) hearing with the exemption from registration for securities issued in a corporate reorganization governed by the former Bankruptcy Act,⁴⁹ which required a finding that the plan of reorganization is fair, equitable and feasible.⁵⁰ There, the necessary inquiry on "feasibility" required valuation of the debtor's business as a going concern and the reasonableness of the prospects for future financial success of the enterprise.⁵¹

The court held that the proper approach to the question of fairness is one that recognizes that "the purpose of the Securities Act of 1933 [is] to protect investors by promoting full disclosure of the information believed to be necessary to the making of informed investment decisions."⁵² The court saw the fairness hearing not as an opportunity to determine the financial soundness of ALC or its securities, but rather as

the functional equivalent of the full disclosure which would be provided in an appropriate prospectus and registration statement. Those receiving the offer under the terms of the settlement agreement have had a full and fair opportunity to learn everything required to make their decision. Accordingly, it must be concluded that they will act in awareness of the risks involved in acceptance and the alternatives attendant upon a decision to decline the offer. Nothing more could be accomplished by registration and nothing more is required in the determination that this settlement should be approved.⁵³

By refusing to determine the value of the securities offered in settlement and to judge the adequacy of that value, the court recognized that its role in a fairness hearing was to assess the quality of disclosure rather than the quality of the securities being offered. To further this goal, the court concluded that the following factors were to be considered in determining the fairness of the settlement:

(1) the recommendations of counsel; (2) the scope of the discovery record as an indicator of the adequacy of the investigation into the facts; (3) the apparent alternatives to the settlement; (4) the nature and volume of responses from those receiving notice of the hearing; and (5) the opportunity for direct participation in the process of obtaining full disclosure.⁵⁴

49. *Id.*

50. Bankruptcy Act of 1898, §§ 174, 216, 11 U.S.C. §§ 574, 616 (1976) (repealed 1978).

51. 6A Collier on Bankruptcy ¶ 11.07, at 235 (L. King & A. Herzog rev. 14th ed. 1977).

52. 511 F. Supp. at 802.

53. *Id.*

54. *Id.* at 801.

The court did not consider the complexity, expense, duration and risks of the litigation if the settlement was not approved. These factors, however, are also relevant to the issue of fairness.

A. *Recommendations of Counsel*

In considering settlement of class actions and derivative suits, courts have traditionally presumed that the attorneys have negotiated in good faith and, consequently, have given their recommendations substantial weight, particularly when the attorneys involved were experienced and reputable and there was evidence of arm's length bargaining.⁵⁵ As one court put it, "a court should not substitute its judgment for that of the parties who worked out the settlement, in the absence of fraud, collusion or bad faith, or of evidence that the settlement, taken as a whole, is so unfair as to preclude judicial approval."⁵⁶ Similarly, Chief Judge Edelstein of the Southern District of New York stated in approving a settlement:

This case presents very complex issues of knowledge, intent, materiality, reliance and damages. Experienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their positions has an important bearing on this case.⁵⁷

In an SEC enforcement proceeding, the court should place especially heavy reliance on the recommendations of counsel because in such cases, unlike class actions or derivative suits, there is absolutely no possibility that the settlement is merely an attempt to "buy off" the plaintiff and his attorney.⁵⁸ The plaintiff is the SEC, which has no financial interest in the settlement and is solely interested in protecting the investing public. Courts have traditionally paid great deference to the expertise of administrative agencies in regard to decisions made concerning matters within the agencies' special competence.⁵⁹

55. *E.g.*, *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974); *Neuman v. Electronic Specialty Co.*, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,955, at 90,516 (N.D. Ill. Jan. 28, 1971); *see* 3 H. Newberg, *supra* note 12, § 5610d; *Haudek*, *supra* note 42, at 798.

56. *In re Four Seasons Sec. Laws Litig.*, 58 F.R.D. 19, 40 (W.D. Okla. 1972).

57. *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,525, at 92,520 (S.D.N.Y. June 6, 1972) (class action alleging fraud in the offering of securities). In *Lyons*, the court approved a proposed settlement representing 25% of maximum possible recovery in light of recommendations of counsel, lack of objections and extensive pre-trial discovery. *Id.*

58. *See* 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1839, at 427-28 (1969) (court approval is intended to discourage private settlement when plaintiff and his attorney benefit to exclusion of others).

59. *See* *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Environmental Defense Fund v. Environmental Protection Agency*, 598 F.2d 62, 90 (D.C. Cir. 1978).

Thus, in an SEC enforcement proceeding the court should attribute great significance to the fact that the SEC, the very agency charged with enforcing the securities laws, has approved the settlement.

In *Blinder Robinson*, the court properly gave particular weight to this factor, stating from the bench that

[a]mong the things that are to be considered are the recommendations of counsel, and in this regard I have considered not only the statements of counsel made at this hearing this morning with respect to the negotiating history, but also I take note of the earlier proceedings in this case of which I have presided, and in which I have noted that all counsel who are participating in submitting this settlement have also participated in the aggressive representation of their respective clients and their interests, and I have no doubt that there is nothing collusive about this negotiated agreement.

. . . .

I have in this case placed great reliance on the approval of this settlement by the Securities and Exchange Commission, and that exhibit which is the letter from the Secretary advising me of the Commission's approval is, to my mind, the most important exhibit received here.⁶⁰

B. *Amount of Discovery*

The extent of discovery is a factor closely related to the recommendations of counsel because a factual record developed through depositions and document production enables counsel for both sides to evaluate better the relative strengths and weaknesses of their respective cases and thus facilitates settlement. This factor also provides the court with a yardstick against which to measure counsel's recommendations. Accordingly, although there is no precise formula for what constitutes a sufficient record to enable a court to evaluate intelligently a settlement of a class action or derivative suit, it is certain that "[a]t minimum, the court must possess sufficient evidence to raise its decision above mere conjecture."⁶¹ Ordinarily, a court asked to approve a settlement relies on the discovery already completed by the parties and any other evidence they have marshalled in preparation for the trial.⁶² Thus, the more discovery that has been completed, the greater the chances for approval.

60. Reporter's Transcript of Proceedings: Findings at 4, 5, 10, SEC v. Blinder Robinson & Co., 511 F. Supp. 799 (D. Colo. 1981) (statement of Judge Matsch on Apr. 10, 1981).

61. 3 H. Newberg, *supra* note 12, § 5610b, at 497-98 (footnote omitted).

62. Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 463-64 (2d Cir. 1974).

Determining the amount of discovery obtained is equally important in a section 3(a)(10) fairness hearing. The SEC, prior to bringing an enforcement action, ordinarily will conduct an extensive administrative investigation of the case to determine whether an action should be brought. This investigative record is available to the court in the settlement of an ensuing enforcement proceeding, together with any discovery that has been taken by the SEC or the defendants. The court is thus provided with an extensive evidentiary record upon which it can base the decision.

It is interesting to note that in *Blinder Robinson* the court gave this factor only limited weight, stating:

There has been time for a complete investigation into the facts in this case and it is apparent that counsel have made full use of discovery procedures. I have not examined the discovery record because I will be the trier-of-fact on the issues [involving the non-settling] parties and it would be inappropriate to obtain detailed information before the trial. It is for the same reason that I have avoided asking counsel to give any opinions concerning the relative merits of the positions taken on behalf of the settling parties while they were in an adversary posture.⁶³

In addition to the evidence available as the result of discovery, the court may, of course, receive additional evidence at the fairness hearing itself in the form of affidavits or live testimony.⁶⁴ The court also has the discretion to relax the formal rules of evidence at the hearing to facilitate the presentation of such additional evidence.⁶⁵ Defendant's counsel should take advantage of the relaxation of the rules to present evidence not already before the court. Keeping in mind that the hearing is taking the place of a written disclosure statement, defendant's counsel should submit evidence similar to that found in a registration statement and argue to the court that such evidence is *prima facie* grounds for approval of the settlement.⁶⁶

63. 511 F. Supp. at 801-02. As a practical matter, the court's reluctance to rely heavily on the discovery documents is probably sound. First, in an SEC enforcement context, it would be both unnecessary and unfair to require the judge to conduct an extensive and time-consuming review. Second, when determining the fairness of settlements, courts have traditionally looked to discovery largely in order to determine whether each side has had an adequate opportunity to make a reasonably accurate assessment of its case. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Slade v. Shearson, Hamill & Co.*, 79 F.R.D. 309, 314 (S.D.N.Y. 1978). Because of the nature of an SEC enforcement proceeding, in which extensive discovery has already been conducted at the investigatory stage, lack of sufficient information about the strengths and weaknesses of claims is unlikely.

64. *Haudek*, *supra* note 42, at 801.

65. *Pergament v. Frazer*, 93 F. Supp. 13, 19 (E.D. Mich. 1950), *aff'd sub nom. Masterson v. Pergament*, 203 F.2d 315 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953).

66. Previously, in class actions, evidence submitted to assist the court in its determination has included testimony of investment bankers, professors of finance

C. Alternatives to Settlement

Although the *Blinder Robinson* opinion described the third factor as "the alternatives to settlement," this factor actually should focus on the ability of the settling defendants to survive a judgment in an amount greater than the settlement. In regard to this situation one court has stated that "[a] settlement amount which would plunge the defendants into immediate bankruptcy would not serve the best interests of the class of claimants. . . . The court then looks to the defendants' ability to pay in weighing the strengths of the case and the potential bounds of injury."⁶⁷

Expert testimony is particularly useful in informing the court of the financial effects of settlement and its various alternatives. In *Blinder Robinson*, the settling defendants introduced testimony of a chartered financial analyst regarding the financial condition of ALC. He reviewed for the court the issuer's last periodic SEC filings and opined that the issuer, being in a developmental stage, could not afford a cash settlement. The expert went on to testify that rescission and full restitution, the remedy originally sought by the SEC and certain shareholders, would entail the liquidation of ALC. Furthermore, liquidation would have resulted in the shareholders receiving substantially less than their initial investment and would have rendered worthless the value of certain capital assets of ALC, such as the regulatory approval for the building of its planned casino.⁶⁸ Recognizing the consequences of rescission to both ALC and its shareholders, the court found the settlement to be a preferable alternative.⁶⁹

This conclusion was undoubtedly correct, for in an SEC enforcement action the alternative to settlement for shareholders would be to file individual actions or a class action. The former alternative is impractical given the amounts involved, and the latter is expensive with no assurance of either class certification⁷⁰ or recovery.⁷¹ Share-

and officers of the corporate defendant. Haudek, *supra* note 42, at 796-803. Similarly, admission of such oral testimony is beneficial in a § 3(a)(10) hearing.

67. *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1378 (N.D. Ga. 1979) (footnote omitted), *modified and remanded*, 645 F.2d 488 (5th Cir. 1981). Rescission has been granted in cases involving particularly egregious violations. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) (rescission ordered where antifraud provisions and prospectus delivery requirement of securities laws violated in connection with an all-or-nothing public offering). No cases have used the remedy, however, where liquidation would result. This is in keeping with the remedial rather than punitive character of the 1933 Act. *See generally SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973); *SEC v. Franklin Atlas Corp.*, 171 F. Supp. 711, 718 (S.D.N.Y. 1959).

68. 511 F. Supp. at 802; *see supra* text accompanying note 30.

69. 511 F. Supp. at 802.

70. A. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 13 (2d ed. 1977) ("judge must make seven affirmative findings before the case can be certified as a class action"); *see H. Newberg, supra* note 12, §§ 1030-1080.

71. 3 H. Newberg, *supra* note 12, § 6926e.

holders would have to pay legal fees and expenses out of any recovery,⁷² which, on average, would reduce the amount of the recovery by fifteen to twenty-five percent.⁷³ As in the case of an SEC enforcement proceeding, if the class plaintiffs obtained rescission of the public offering, the result would be liquidation of the issuer. Thus, assuming, *arguendo*, that the shareholders could obtain complete rescission in a class action, their recovery would probably be far less than would result from the settlement. The vagaries of a class action contrast sharply with the low risk associated with the settlement; the shareholders will not have to expend money on litigation, take the chance of failing to obtain class certification or losing on the merits, or having to pay counsel a substantial portion of any recovery. The certainty of relief for the shareholders provided by the settlement thus constitutes a powerful argument for approval.

*D. The Reaction of Those Directly Affected
by the Settlement and the Opportunity
for Direct Participation in the Process
of Obtaining Full Disclosure*

Traditionally, courts have considered the lack of or small number of objections an indication that the settlement is a fair one.⁷⁴ One commentator, however, cautions that "in sophisticated securities settlements where the majority of absent class members are usually unrepresented by counsel and possess insufficient knowledge to evaluate the fairness of the settlement, such a conclusion may be dangerous."⁷⁵

It is evident that a settlement under section 3(a)(10) poses no such dangers. Unlike a class action settlement, where a class member must

72. *Id.* § 6905a, at 1120; see 7A C. Wright & A. Miller, *supra* note 58, § 1803.

73. See, e.g., *In re Penn Cent. Sec. Litig.*, 416 F. Supp. 907, 913 (E.D. Pa. 1976) (settlement notice restricted attorneys' fees to 25% of plaintiffs' recovery), *rev'd on other grounds*, 560 F.2d 1138 (3d Cir. 1977); *Milstein v. Werner*, 58 F.R.D. 544, 551 (S.D.N.Y. 1973) (court awarded attorneys' fees equal to 15% of the cash benefit realized pursuant to the settlement of the class action); *Volovitz v. VTR, Inc.*, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,292 (S.D.N.Y. Nov. 26, 1971) (attorneys' fees equaled approximately 19% of plaintiffs' recovery); *Fox v. Glickman Corp.*, 253 F. Supp. 1005, 1015 (S.D.N.Y. 1966) (court granted attorneys' fees equal to 16% of the settlement amount).

74. See, e.g., *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972) (court approved settlement of a class action antitrust case based, *inter alia*, on the small number of objectors where 150 out of 14,000 claimants were represented by counsel and only 5 of the 150 objected to the settlement); *Josephson v. Campbell*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,347, at 97,658 (S.D.N.Y. Jan. 24, 1969) (court stated that "the absence of objection by virtually the entire body of stockholders" supported the presumption that the settlement was fair and reasonable).

75. 3 H. Newberg, *supra* note 12, § 5610e.

opt out if he does not wish to be bound by the settlement, a shareholder in the context of an SEC enforcement proceeding must manifest his desire to join in the settlement.⁷⁶ The court in *Blinder Robinson* recognized that the settlement was not binding on those who did not elect to participate.⁷⁷ Accordingly, those shareholders were free to pursue legal remedies against the settling defendants in separate actions. Moreover, in the case of a partial settlement like the one in *Blinder Robinson*, the shareholders may obtain additional relief from the non-settling defendants⁷⁸ irrespective of the shareholders' decision to participate in the settlement.

The *Blinder Robinson* court attached some importance to the fact that "only a few" objections to the settlement were received although over eleven thousand notices were mailed to the shareholders.⁷⁹ The court further noted that those shareholders who appeared personally favored the settlement.⁸⁰ The court did not believe that its role was "to play devil's advocate and represent those who [were] not there to represent themselves."⁸¹ Rather, the court felt that the availability of an opportunity to file objections, attend the hearing, make comments and question the chief operating officer of the issuer constituted adequate protection of the shareholders' interest. Thus, the court utilized the underlying policy of the 1933 Act, that of maximizing disclosure, rather than making or recommending investment decisions for individuals.⁸²

Since the fairness hearing serves as a substitute for a registration statement, it may be said that the procedure adopted by the court in

76. In an SEC enforcement proceeding, an "opt in" provision is the preferable method of achieving maximum participation in the settlement. Because property interests of absent and unrepresented parties may be affected, the alternative "opt out" provision may raise an improper joinder issue. See *Fletcher Aircraft Co. v. Bond*, 77 F.R.D. 47 (C.D. Cal. 1977) (judgment substantially affecting rights of party who is not joined violates due process). An "opt in" provision gives shareholders the right to participate in the settlement and binds only those shareholders who affirmatively choose to participate. In *Blinder Robinson*, shareholders opted in by sending a Proof of Claim and Release to the issuer. See *supra* notes 36-38 and accompanying text. In an "opt out" situation, the shareholder is bound by the settlement unless he affirmatively acts to exclude himself from the settlement. *Feder v. Harrington*, 58 F.R.D. 171, 177 n.18 (S.D.N.Y. 1972).

77. Reporter's Transcript of Proceedings at 7, SEC v. *Blinder Robinson & Co.*, 511 F. Supp. 799 (D. Colo. 1981) (statement of Judge Matsch on Apr. 10, 1981).

78. See *Seiffer v. Topsy's Int'l Inc.*, 70 F.R.D. 622, 630 (D. Kan. 1976) ("potential recovery of the class is not necessarily limited to the amounts in the proposed agreement between the plaintiffs and [the settling] defendants").

79. 511 F. Supp. at 802.

80. *Id.*

81. Reporter's Transcript of Proceedings: Findings at 9, SEC v. *Blinder Robinson & Co.*, 511 F. Supp. 799 (D. Colo. 1981) (statement of Judge Matsch on Apr. 10, 1981).

82. See *supra* notes 52-53 and accompanying text.

Blinder Robinson—which gives shareholders notice of the proposed settlement and an opportunity to comment on or object to its terms—properly served the purposes of section 3(a)(10). Just as the SEC does not judge the quality of the securities it approves for registration, the judge in a fairness hearing should not pass on the quality of securities issued in a settlement. Rather, just as the registration statement provides prospective shareholders the opportunity to judge for themselves, on the basis of full disclosure, the nature of the securities offered, the fairness hearing allows shareholders to decide for themselves whether to accept the securities offered in the settlement. If the shareholders choose not to attend the fairness hearing, they are no worse off than offerees who do not read a registration statement. Clearly, the court was correct in viewing its responsibility as that of ensuring adequate disclosure.⁸³

*E. The Complexity, Expense and Duration of the
Litigation if the Settlement Is Not Approved*

Although the expense of litigation is always present as a factor supporting settlement, the court should nevertheless recognize the burdens that continued litigation may place on both the company and its shareholders. Not only is litigation extremely expensive, it also distracts the officers from the running of the business and focuses their energies on the task of defending the lawsuit.⁸⁴ This is particularly true in securities cases, where the legal and factual issues are inevitably complex and the allegations of the complaint frequently concern the conduct of senior management. Recognizing these factors, one commentator has stated that “[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval is preferable to lengthy and expensive litigation.”⁸⁵

In a section 3(a)(10) hearing, the cost of continued litigation can be adduced through expert testimony or by a representation to the court by counsel for the settling defendants.⁸⁶ The consequences of such expenditures for litigation can then be analyzed by the expert witness.

83. The opinion, however, may have attached too much importance to the small number of shareholders objecting to the settlement. See *Haudek*, *supra* note 42, at 800 (“silence of the stockholders does not relieve the court of its duties to the absent [stockholders] but adds to its responsibility to reach an independent and objective judgment”).

84. *Id.* at 798; see *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 656 (7th Cir. 1971); cf. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 362 (S.D.N.Y.) (recapitalization effected through settlement will improve corporation's economic prospects), *aff'd mem. sub nom. Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973).

85. 3 H. Newberg, *supra* note 12, § 5610g, at 506 (footnote omitted).

86. See *Haudek*, *supra* note 42, at 801-02 (court has discretion to permit estimate by counsel where expert testimony would be too expensive).

F. *The Risks of Litigation*

Traditionally, courts have recognized the inherent risks of litigation in determining whether to accept a proposed settlement.⁸⁷ Courts have sought to assess these risks by balancing the strength of plaintiff's case—which turns on the possibility of establishing liability, the possibility of proving damages and, in the case of class actions, the risk of maintaining the class through the trial—against the amount offered in the settlement.⁸⁸

Estimating the strength of plaintiff's case requires consideration of whether the case involves "serious questions of law and fact which place the ultimate outcome of the litigation in doubt."⁸⁹ Indeed, courts frequently cite the existence of such questions as grounds for approving settlements.⁹⁰ In seeking approval of a settlement under section 3(a)(10), counsel should emphasize the risks of establishing liability, the likelihood of recovering damages or other relief and, in a class action, the problems associated with establishing, notifying and maintaining the class.

The utility of arguing the risks of litigation as a factor is significantly affected by whether all the parties are settling or whether only some of them are. When only certain of the defendants have agreed to settle, the courts have recognized that the plaintiff does not want to prejudice its case against the remaining defendants by conceding that the weakness of its case induced it to settle. Accordingly, the courts have deemphasized their inquiry into the weakness of the plaintiff's case.⁹¹ Thus, in *Seiffer v. Topsy's International, Inc.*,⁹² a class action brought under the antifraud provisions of the securities laws, the court stated in approving the settlement that

87. *Girsh v. Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622, 627 (D. Kan. 1976).

88. *Haudek*, *supra* note 42, at 793; *e.g.*, *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 315 (S.D.N.Y. 1972); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1972).

89. *Oppenlander v. Standard Oil Co. (Indiana)*, 64 F.R.D. 597, 624 (D. Colo. 1974).

90. *E.g.*, *Newman v. Stein*, 464 F.2d 689, 694 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972); *Quirke v. Chessie Corp.*, 368 F. Supp. 558, 561 (S.D.N.Y. 1974); *Oppenlander v. Standard Oil Co. (Indiana)*, 64 F.R.D. 597, 625-27 (D. Colo. 1974); *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 373 (S.D.N.Y.), *aff'd mem. sub nom.* *Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973).

91. *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622, 629 (D. Kan. 1976); *see In re National Student Mktg. Litig.*, 68 F.R.D. 151, 155-56 (D.D.C. 1974); *cf. In re Fine Paper Antitrust Litig.*, 1980-1 Trade Cas. (CCH) ¶ 63,120, at 77,589 (E.D. Pa. Oct. 2, 1979) (strength of plaintiff's case cannot be estimated with precision in the case of a partial settlement because plaintiffs are naturally reluctant to reveal their case to non-settling defendants).

92. 70 F.R.D. 622 (D. Kan. 1976).

although plaintiffs' counsel . . . have no serious doubts about establishing the defendants' liability, we do not view this as necessarily precluding approval. . . . Class counsel are naturally reluctant to expose their case to the full view of other parties who are still actively litigating their positions and who are in direct opposition to the stance of plaintiffs and the class.

. . . [T]he strength of plaintiffs' claims and hence their likelihood of ultimate recovery . . . is not totally dispositive of the fairness of the proposed settlement. There are also the inherent risks of litigation which weigh in the decision to settle rather than to litigate. The risk of ultimately recovering money damages dogs the heels of even able and zealous counsel, and this is especially true in a case of this magnitude and complexity. The certainty of fixed recovery by way of agreement is often preferable to the vagaries of what might be achieved by a trial.⁹³

Because *Blinder Robinson* involved a partial settlement, the SEC was understandably reluctant to discuss weaknesses in its case against the issuer, given that it still had to try nearly identical factual and legal issues against the remaining defendants before the same judge who conducted the fairness hearing. The partial settlement of an SEC enforcement proceeding also presents problems for the judge, because he will be the finder of fact in the ongoing litigation.⁹⁴

CONCLUSION

SEC v. Blinder Robinson & Co. opens new opportunities for practitioners and courts to make innovative use of section 3(a)(10) in the settlement of some SEC enforcement actions, and sets forth standards for measuring fairness that can be employed in all securities litigation. The section 3(a)(10) exemption provides a practical mechanism for issuing securities in the settlement of securities litigation without the expenses and problems associated with preparing and filing a registration statement. In addition, section 3(a)(10) allows issuers in a developmental stage to carry on their business and fulfill the goals of their public offering instead of being forced into liquidation. *Blinder Robinson* should be the first in a line of cases using this valuable mechanism.

93. *Id.* at 629; see *In re National Student Mktg. Litig.*, 68 F.R.D. 151, 155-56 (D.D.C. 1974); *In re Fine Paper Antitrust Litig.*, 1980-1 Trade Cas. (CCH) ¶ 63,120, at 77,589 (E.D. Pa. Oct. 2, 1979).

94. See *supra* note 63 and accompanying text.